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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 788

HORST VON HENNIG, ANCILLARY EXECUTOR OF THE ESTATE OF CARLO VON WEDEKIND, DECEASED, PETITIONER

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the district court (R. 41–48)[1] is reported at 187 F. Supp. 914. The opinion of the court of appeals (Pet. App. 1a–3a), affirming the district court judgment, is reported at 296 F. 2d 420.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1961 (Pet. App. 4a). A timely petition for rehearing or rehearing *en banc* was denied

[1] "R." refers to the Joint Appendix in the court of appeals, which has been filed in this Court as part of the record.

on December 11, 1961 (R. 263-264). The petition for a writ of certiorari was filed on March 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a German national, resident in Switzerland, who admittedly supervised and controlled, and owned 50% of, a family firm [2] doing business in Italy during World War II was an "enemy," within the scope of Section 2(a) of the Trading With The Enemy Act, and therefore precluded, under Section 9(a) of that Act, from bringing suit to secure the return of his American assets, which had been vested by the United States Government under the Act.

STATUTE INVOLVED

Trading With The Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1, *et seq.*:

> Sec. 2. The word "enemy," as used herein, shall be deemed to mean * * *
>
> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the

[2] The other 50% was owned by his brother, a German national, resident in Germany throughout the war.

United States and doing business within such territory.

* * * * * *

SEC. 9(a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require * * *. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to

> said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled * * *.

STATEMENT

This action was brought under Section 9(a) of the Trading With The Enemy Act, as amended, to recover certain property of the original plaintiff, Carlo von Wedekind. The property had been vested as the property of Oscar von Wedekind and Julia von Knorr (nee Wedekind), both nationals of Germany and brother and sister (R. 10–25). The Attorney General's answer, filed August 20, 1956 (R. 26), placed in issue the enemy status of Carlo von Wedekind (hereinafter Carlo) and whether Carlo had been the pre-vesting owner of the vested property.

Carlo died, and Horst von Hennig (ancillary executor of the estate) was substituted as plaintiff.[3] The Attorney General moved for summary judgment on the ground that Carlo did not qualify under Section 9(a). The Attorney General alleged that Carlo had been an "enemy," as defined by Section 2(a) of the Act, by reason of the fact that he had resided outside the United States and had been doing business within the territory of a nation with which the United States had been at war. The court denied the motion for summary judgment on the ground that there was a dispute of material facts relevant to that issue.

[3] The parties agreed that the eligibility of the present plaintiff to maintain the suit depends solely upon the eligibility of his predecessor, the original plaintiff, Carlo (R. 38).

Upon the government's motion, and with consent of the plaintiff, the court ordered a separate trial on the issue of Carlo's enemy status and advanced the issue for trial (R. 28). After trial, judgment was entered dismissing the complaint on the merits (R. 47).

The court found (R. 41–47) that Carlo, born in Italy of German parents, had been a German national who had lived in Switzerland throughout World War II; that he had been half-owner and sole supervisor of a retail firm, organized by his grandfather as a *societa in nome collettivo*, in Palermo, Sicily, and known as Carlo Wedekind & Co.; that a *societa in nome collettivo*, under Italian law, is an association of individuals, which is more analogous to an American general partnership than a corporation since every member of the *societa* is liable for the firm's debts if its assets are inadequate to satisfy creditors; that the business had continued during the war years (1941–1943); that Carlo's brother, a German national resident in Germany, had owned the other half of the firm but took no part in its supervision or management since long before World War II; and that Carlo had given a power of attorney to one Mueller to manage the business, which Mueller did until 1943, reporting to Carlo from time to time and conferring with him concerning the firm's affairs. On the basis of the evidence and findings, the court concluded that Carlo had been carrying on business in Italy and, accordingly, had been an "enemy" under Section 2(a) of the Act. He was therefore precluded from

suing under Section 9(a) to recover vested American assets.[4]

The claimant appealed, and the court of appeals affirmed on the ground that there was abundant evidence that Carlo had exercised exclusive supervision over the Italian firm, had done business in Italy, and had therefore been an "enemy" under the Act (Pet. App. 2a–3a).[5] Appellant filed a petition for rehearing or rehearing *en banc* in which he raised, for the first time, a constitutional question. This petition was denied (R. 263–264).

ARGUMENT

Both courts below correctly held that the evidence supported a finding that Carlo had been doing business in Italy, a nation which had been at war with the United States, and that, accordingly, Carlo had been an "enemy" under Section 2(a) of the Act, precluded from suit under Section 9(a). The decisions rest on the particular facts of the case. There is no occasion for further review by this Court.

1. Petitioner admits (Pet. 2, 9) that Carlo had been half-owner and supervisor of the Italian firm doing business in Italy but claims that a person doing business within enemy territory is an enemy only with respect to the assets connected to the enemy business

[4] The court found a lack of proof on the government's additional contention that Carlo had been carrying on business in Germany.

[5] The government had filed a protective cross appeal with respect to the issue of Carlo's doing business in Germany. In view of its conclusion, the court found it unnecessary to decide this issue.

and not with respect to other assets (referred to by petitioner as "personal" assets).[2] The controlling statute clearly provides to the contrary. Section 2(a) provides that enemy status attaches to the individual (not to property), and Section 9(a) provides for recovery of property by "any *person* not an enemy." The statute does not exempt any particular property or type of property; nor does it provide for the separation of an enemy's assets into enemy property and non-enemy property. Rather, all the property of an individual who qualifies as an enemy is subject to vesting and non-return. The individual need never have engaged in any enemy business or even in any business whatsoever to qualify as an "enemy"; he is considered an "enemy" merely by virtue of residence in an enemy country even though he may be, not a German national, but a United States citizen. See *Miller* v. *United States*, 11 Wall. 268, 305, 311.

In *Von Opel* v. *Brownell*, 244 F. 2d 789 (C.A.D.C.), certiorari denied, 355 U.S. 878, the court held that a citizen of a neutral country who was not an enemy either because of residence in an enemy country or because of doing business in enemy territory was nevertheless precluded, under Section 9(a), from recovering the assets of a Swiss corporation, because he had arranged for German nationals to retain certain beneficial interests in the Swiss company. Moreover, in *Kennedy* v. *Christiani-Onken* (C.A.D.C., No. 16364) and *Kennedy* v. *Rommel* and *DeCourten* (C.A.D.C., Nos. 15447,

[2] Petitioner's invocation of common law doctrine (Pet. 7-15)—even if the doctrine be correct—cannot prevail over a statutory provision.

16450, 16448 and 16449), all decided March 15, 1962: "enemies" were precluded from recovering property which had not been connected in any way with enemy business or enemy warfare. In the *Rommel* and *De Courten* cases, the vested property had consisted of the interests of beneficiaries of trusts set up in America by American citizens with American funds. Similarly in the present case, all of Carlo's property was subjected to vesting by the United States and to non-recovery because of his enemy status, regardless of whether the vested property was part of the enemy business, economy or war effort. Cf. *Uebersee Finanz-Korp.* v. *McGrath*, 343 U.S. 205, 242; *Swiss Insurance Co.* v. *Miller*, 267 U.S. 42.

Petitioner's quotation from the remarks of Congressman Montague (floor manager of the bill that became the Trading With The Enemy Act) (Pet. 20) adds further support to the proposition that enemy status attaches to the individual, not merely to a portion of his property; that doing business within an enemy country confers on an individual the same "enemy" status as does residence in an enemy country; and that all of an enemy's property is subject to vesting and non-return, whether he acquired the enemy status through residence or through doing business within an

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[7] If a writ of certiorari should be granted, the government reserves the right to show that the court's decision precluding suit by the petitioner was correct not only by reason of Carlo's doing business in Italy but also because of his doing business in Germany (see notes 4 and 5, *supra*, p. 6).

enemy country. Congressman Montague made it clear that (55 Cong. Rec. 4843 (emphasis added)):

> * * * a neutral carrying on business in Germany is an enemy under this bill, and because he does business, the larger part of the business as to that, with citizens of friendly countries *does not alter his enemy character.* It would be *impossible to separate or distinguish his enemy business from his neutral business.* His credit, his solvency, could not be separated and apportioned. He has in law a business residence in Germany, and of necessity he must, quoad this business, *stand as other residents of Germany.*

2. The constitutional question which petitioner seeks to raise in this Court was not properly presented to the court below and therefore cannot be raised here. Mention of a constitutional question was made for the first time after the decision by the court of appeals and on petition to that court for rehearing when the petitioner, among other matters, asked for permission to brief "the constitutional questions" involved.

Moreover, the constitutional question raised would have merit only if Carlo were not to be considered an enemy. This Court established long ago that the power to declare war includes the right to seize and confiscate all property of an enemy, and that the term "enemy" may include, not only enemy nationals, but also neutrals, friends and even United States citizens who are doing business within the territory of a nation with which the United States is at war. See *Miller v. United States, supra; Silesian-Ameri-*

can Corp. v. *Clark*, 332 U.S. 469, 475. Since the Congress has defined an enemy in terms clearly within its powers, and since the courts below have properly found the facts to be that Carlo had been doing business within enemy territory, the claim of violation of a constitutional right is wholly without merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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